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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 167

STUYVESANT TOWN CORPORATION, A CORPORATION,
Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EUGENE MEACHAM,
Counsel for Petitioner,
824 Connecticut Ave. N.W.
Washington 6, D. C.

Of Counsel:
DANIEL O. DECHERT,
824 Connecticut Ave. N. W.
Washington 6, D. C.

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No. 167

STUYVESANT TOWN CORPORATION, A CORPORATION,
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v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Stuyvesant Town Corporation, prays that a writ of certiorari issue to review the judgment entered in this case on April 7, 1953, by the United States Court of Claims.

Opinion Below

The opinion of the Court of Claims is reported in 111 Fed. Supp. 243.

Jurisdiction

The opinion and judgment of the Court of Claims were entered on April 7, 1953, denying petitioner's petition for refund of Federal stamp taxes paid by it on the issuance of certain documents, upon the conclusion that as a matter of law petitioner was not entitled to recover. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Question Presented

Whether the "4½% income debenture certificates" (facsimile in Appendix hereto) issued by petitioner to Metropolitan Life Insurance Company, its parent corporation, to evidence loans in excess of $100,000,000 to petitioner from its parent are subject to the stamp tax imposed by Section 1801, Internal Revenue Code.

Statute Involved

Section 1801, Internal Revenue Code, as amended, imposes a tax "on all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 11 cents . . ."

Section 1801 implements section 1800. The pertinent parts of these sections and of other sections to which reference is made are set forth in the Appendix.

Statement

Petitioner, a wholly-owned subsidiary of Metropolitan Life Insurance Company, was organized by Metropolitan in 1943 under the New York Redevelopment Companies Law (Chap. 2, Tit. 11, Uncons. L. of N. Y. sec. 3401-3426).[1] Pertinent extracts from the Law as of 1943 are set out in the Appendix hereto. The Law was adopted to create a vehicle (the redevelopment company) through which insurance companies and others could lawfully furnish funds for the much

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[1] Chap. 2 was enacted by Chap. 845, of the Laws of 1942, and rewritten by Chap. 234, of the Laws of 1943. The Law as it has existed from 1943 on is found in McKinney's Uncons. L. of N.Y. 1942 and 1949 eds. with supplements.

needed rehabilitation of "sub-standard" or slum areas. Although the Law as it existed at the time at which petitioner undertook to erect the project described below did not permit insurance companies to acquire directly the areas to be condemned and renovated,[2] it enabled them to control the stock of a redevelopment company and to lend money to such a company against "income debenture certificates" (sec. 3425). Redevelopment companies, to be created specially under the Law (sec. 3404), were authorized in turn to take title to such areas from the municipality at cost after exercise by the latter of its delegated power of eminent domain through proceedings of condemnation in regard thereto (sec. 3420). Thereafter, the redevelopment company was to clear the condemned area, and operate thereon, under limitations prescribed in an agreement to be entered into with the municipality, a modern housing project consisting of apartments leased at stated rentals controlled by the agreement (sec. 3415).

The rehabilitation by redevelopment companies of slum areas was declared by the Legislature to be a public use and purpose (sec. 3402). The municipality was authorized to grant an exemption from local and municipal taxes[3] for a period of 25 years, applicable to the increase in valuation of the real property constituting the project over its valuation as slum area at the time of acquisition (secs. 3402, 3426). The Law required the certificate of incorporation of a redevelopment company to state that after provision for all expenses, taxes and assessments, there should be paid annually out of the earnings of the company for interest, amortization, depreciation and dividends a sum equal to but not exceeding 6% of the total actual final cost

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[2] Sec. 3425 as amended in 1947 gave such right.

[3] Other than assessments for local improvements.

of the project as defined (sec. 3404).[4] *It was further required that the certificate state that any cash surplus derived from earnings remaining in the treasury of the company in excess of the amount necessary to provide such cumulative annual sums should on dissolution of the company be paid into the general fund of the municipality* (sec. 3404).

Apart from the issuance of capital stock (sec. 3404), redevelopment companies were authorized to obtain the necessary funds for the execution of the described public use through the issuance of mortgage bonds (sec. 3412)[5] and of the new species "income debenture certificates" (sec. 3411). The latter device was adopted under a section reading as follows:

> "§ 3411. *Income debentures.*
>
> With the approval of the supervising agency, the certificate of incorporation, or an amended certificate, may authorize the issuance of income debenture certificates bearing no greater interest than six per centum per annum. Such income debenture certificates and any instrument under which they are issued may contain such other provisions, including provision for amortization by serial maturities, through the operation of a sinking fund, or otherwise, as may be approved by the supervising agency."[6]

It should be noted that sec. 3411 prescribes no particular form for "income debenture certificates."

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[4] Sec. 3404 further provided that the obligation in respect of such payments should be cumulative and that a deficiency in any year should be paid either from cash surplus derived from earnings remaining in the treasury of the company in excess of the amount necessary to provide such cumulative annual sums or from the first available earnings in subsequent years.

[5] Under prescribed conditions made proper investments for New York fiduciaries (sec. 3412), in distinction to "income debenture certificates".

[6] In this case the Superintendent of Insurance of New York was the supervising agency.

The Agreement

The Redevelopment Companies Law required that a redevelopment project be governed also by the terms of a contract to be entered into with the municipality where such project is to be located (sec. 3415). Petitioner, its parent corporation Metropolitan Life Insurance Company, and the City of New York entered into an agreement, dated as of June 1, 1943, providing for the clearance of a substandard area (approximately 18 city blocks in the Borough of Manhattan, City of New York) and the erection therein of a redevelopment project consisting of 35 buildings containing 8,755 apartments. The agreement specified the rent that might be charged for residential rooms, and a procedure to be followed if an increase was desired under specified conditions (sec. 307, R. 33). It was further agreed, *inter alia*, that Metropolitan, owner of all capital stock of Stuyvesant (sec. 309, R. 34) would lend the funds as needed for the completion of the project against the issuance by Stuyvesant to Metropolitan of "income debenture certificates," maturing January 1, 1984, bearing interest at the rate of 4½%, payable out of "available earnings" of Stuyvesant, as defined in the agreement (secs. 301-2-4, R. 30-31). Provisions for amortization payments on the income debenture certificates, within the limits prescribed by the Law, were set forth in the agreement (sec. 304).[7] For the sake of brevity, the "income debenture certificates" were sometimes referred to in the agreement as "debentures" (sec. 301, R. 30).

Metropolitan guaranteed to the City the performance of the terms of the agreement by Stuyvesant (sec. 701). The City of New York granted exemption from local and municipal taxes (other than assessments for local improvements) for a period of 25 years to the full extent permitted

[7] R. 30-31.

by Law (sec. 306, R. 33). Stuyvesant surrendered in the agreement (sec. 601, R. 35) for a period of five years the right which it had as a redevelopment company to waive this tax exemption (sec. 3426) by electing to pay to the City the amount, with interest, of all accrued taxes from which exemption had been granted. *Metropolitan agreed that during the period of tax exemption it would not, without the consent of the City, transfer any of the stock or income debenture certificates of Stuyvesant* (sec. 309, R. 34). *The income debenture certificates bore none of the hallmarks commonly found in bonds, debentures, certificates of indebtedness, or other corporate securities. They were unsecured, were on plain white paper, without seal, without interest coupons and not in registered form, were non-negotiable and as explained above were essentially non-assignable. They could have no market because of the restriction on assignability.*

Payments

Stuyvesant issued at various times before the institution of this suit income debenture certificates under sec. 3411 of a total face amount well in excess of $100,000,000. Stamp tax was paid on these instruments in the amount of $110,-321.20. After denial of a timely claim for refund, rejected by the Commissioner on the vague ground, unsupported by reasoning, that the instruments were taxable as debentures or as certificates of indebtedness, the present suit was duly instituted for the return of the said tax with interest.

The Opinion Below

The Court below held the instruments to be taxable, and rendered judgment against petitioner. It did so in the face of the following statement in the opinion (R. 23):

"The evidence is clear and convincing, and defendant concedes, that the income debenture certificates issued by

plaintiff are not of the type known generally to those who deal in the corporate security trade as bonds, debentures, certificates of indebtedness, or corporate securities." (Emphasis supplied.)

Dividing the statute into two parts, the Court said (R. 24):

"We think that it is apparent from the face of the statute that Congress contemplated a stamp tax upon two classes of corporate instruments, namely (1) bonds, debentures, and certificates issued by a corporation, . . . *whether known generally as corporate securities or not,* and (2) all other instruments, however termed, bearing interest coupons or in registered form, *and* known generally as corporate securities . . ." (Emphasis of Court retained.)

The Court (R. 26-7) found the instruments at bar to "represent a long-term investment by Metropolitan in the Stuyvesant Town Project carried on by its wholly-owned subsidiary. As such, it is believed . . . that the instruments were subject to the stamp tax imposed by sections 1800 and 1801 . . ."

The Court also found (R. 27) that:

"The negotiability or assignability of corporate securities is of importance in determining their attractiveness for investment purposes, but it cannot be entirely determinative of the incidence of the stamp tax act upon the securities."

Finally, the Court strangely held (R. 28):

"We find it unnecessary to decide whether the income debenture certificates are technically 'debentures' or 'certificates of indebtedness', for the reason that, in our opinion, the terms and purposes of the income debenture certificates combine to put them well within the class of investment securities which Congress intended to tax."

Specification of Errors to Be Urged

The Court of Claims erred in holding that the instruments were taxable:

(1) Without being known generally as corporate securities.

(2) Without being negotiable or assignable.

(3) Without bearing interest coupons or being in registered form.

(4) As long-term investments.

(5) Without being comprised within the common-speech import of the taxing words among the public in which such words take effect.

(6) As investment securities.

Reasons for Granting the Writ

Summary of Reasons

I. The decision of the Court below is in conflict with decisions of the Courts of Appeals for the Seventh, Third, Fifth, and Eighth Circuits:

(a) In declaring that instruments may be taxable as "bonds, debentures, and certificates issued by a corporation . . . whether known generally as corporate securities or not . . .", the decision of the Court below is in conflict with that of the Seventh Circuit in *Wilkinson* v. *Mutual Bldg. & Sav. Ass'n* (CCA-7, 1926), 13 Fed. (2d) 997.

(b) In declaring that negotiability or assignability is not necessary for instruments to be taxable, the decision of the Court below is again in conflict with the *Wilkinson* decision and also with that of the Third Circuit in *Dauphin Deposit Trust Co.* v. *United States* (CCA-3, 1935), 80 Fed. (2d) 893.

(c) In rejecting the attributes of interest coupons and of registered form as alternative requirements for the taxation of instruments as "bonds, debentures, or certificates of

indebtedness," the decision below is in conflict with the decision of the Third Circuit in *Bellefield Co.* v. *Heiner* (CCA-3, 1928), 25 Fed. (2d) 560.

(d) In declaring that the instruments are taxable as long-term investments, the decision below is in conflict with the decisions of the Seventh Circuit in *Belden Mfg. Co.* v. *Jarecki* (CCA-7, 1952), 192 Fed. (2d) 211; of the Fifth Circuit in *Allen* v. *Atlanta Metallic Casket Co.* (CCA-5, 1952), 197 Fed. (2d) 460; and of the Eighth Circuit in *United States* v. *Ely & Walker Dry Goods Co.* (CCA-8, 1953), 201 Fed. (2d) 584.

II. The decision of the Court below does not give proper effect to the decisions of this Court in *United States* v. *Isham* (1873), 84 U.S. 496, and *Lederer* v. *Fidelity Trust Co.* (1925), 267 U.S. 7, which declare respectively that the words of a stamp tax statute "are to be taken in the sense in which they will be understood by that public in which they will take effect", and that the words of the statute refer to "common speech".

III. The case raises important questions of Federal law which have not been, but should be, settled by this Court.

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(a) The Court below erred in taxing the instruments as investment securities.

Discussion of Reasons

I. *The decision of the Court below is in conflict with decisions of the Courts of Appeals, for the Seventh, Third, Fifth and Eighth Circuits:*

(a) *In declaring that instruments may be taxable as "bonds, debentures, and certificates issued by a corporation . . . whether known generally as corporate securities or not . . .", the decision below is in conflict with that of*

the Seventh Circuit in Wilkinson *v.* Mutual Bldg. & Sav. Ass'n (CCA-7, 1926), 13 Fed. (2d) 997.

The Court below expressly recognized the conflict, saying:*

"In *Wilkinson* v. *Mutual Bldg. & Sav. Ass'n.*, 13 Fed. (2d) 997, construing a similar section in the Revenue Act of 1921, the Court said, at p. 998:

. . . the words 'known generally as corporate securities', must be held not only by reason of the subject-matter of the section, but also by reason of the punctuation,[8] to refer to 'bonds, debentures or certificates of indebtedness', as well as to those instruments specifically referred to as being issued by corporations . . .

"Since that time, however, the matter has been considered by other courts, and a contrary conclusion reached. The Bureau of Internal Revenue has also changed its position on the question. As we are in agreement with the later cases as showing the correct interpretation of the statute, we must decline to follow the conclusion reached in the *Wilkinson* case."

The later cases to which the Court below refers are *General Motors Acceptance Corp.* v. *Higgins*, (CCA-2, 1947), 161 Fed. (2d) 593, cert. den. 332 U. S. 810, and *Commercial Credit Co.* v. *Hofferbert* (CCA-4, 1951), 188 Fed. (2d) 574, *aff'g per curiam* (D C Md., 1950) 93 Fed. Supp. 562.[9]

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* R. 23-4.

[8] See Note "Should Term Loan Notes Be Taxable under Section 1801 of the Internal Revenue Code?" 39 Va. L. R. No. 2 (February, 1953), p. 197 at p. 209, footnote 63: ". . . It is to be noted that the punctuation referred to in the *Wilkinson* opinion still exists in the same form in Section 1801."

[9] The Court below also relied on *In re Follansbee Brothers Co.* (D C W D Penn., 1940)* a District Court decision construing the statute as divided into two parts in the manner found by the Court below. The District Court thereby misconstrued the scope of the Third Circuit's decision in *Bellefield Co.* v. *Heiner*, (CCA-3, 1928), 25 Fed. (2d) 560, of course binding upon the District Courts of that Circuit.

* 42 Fed. Supp. 448.

The Court of Appeals in the *General Motors* decision considered that the addition by the Revenue Act of 1918 to Schedule A of Section 1100 thereof, entitled "Bonds of Indebtedness", of the phrase "and all instruments, however termed, issued by any corporation, with interest coupons or in registered form, known generally as corporate securities," following the phrase previously appearing in the statute "on all bonds, debentures, or certificates of indebtedness issued by any person," added something to the statute, saying:* "It seems obvious that this change was not to restrict prevailing taxation but was to add to what was already taxable all other instruments generally known as corporate securities provided those to which taxation was extended were issued with interest coupons or in registered form." *The Court cited nothing from the Committee reports nor from any other source to uphold this conclusion.* The *Commercial Credit* decision merely followed *General Motors* on this point.**

This construction of the statute, followed by the Court below, gives rise to confusion because of its contrast to the construction adopted in the *Wilkinson* case. Moreover, it seems to be incorrect. Contrary to the impression raised by the statement in the General Motors case, the relevant House Report accompanying the Revenue Bill of 1918 declared that the bill would *reenact* the stamp tax provision of the Revenue Act of 1917 (in which the statute taxed the issuance of bonds, debentures, and certificates of indebtedness without more), except for a specified change in rates.[10] Also, the Senate Report said that no *changes of importance* were made in the stamp tax title, except for a specified

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* 161 Fed. (2d) 593 at 597.

** 93 Fed. Supp. 562 at 564.

[10] H.R.R. 767, 65th Cong. 2d Sess. (accompanying H.R. 12863), CB 1939-1 (Part 2), p. 113.

change in rate.[11] The title covering the Schedule remained *"Bonds of Indebtedness"*. With the advent of the Internal Revenue Code of 1939, the title was changed to *"Corporate Securities"*, as if to clarify the section's scope by specifying an all-inclusive category.

The Treasury, at the outset, construed the Act of 1918 as taxing only instruments having the general character of investment securities. This construction was made by the Solicitor of the Treasury in Law Op. 909, S.T. 1-20-85, Nos. 1-112. In this ruling, the Treasury struck down the Commissioner's construction of 1918, contained in Treas. Dec. 2713, that the Act taxed "any instrument acknowledging liability for the payment of money."[12] As late as 1933, the General Counsel of the Bureau of Internal Revenue, expressly following the *Wilkinson* case, ruled that in order to be subject to tax under Schedule A-1 of the 1926 Act, (in which the relevant language is identical to that of the Internal Revenue Code) "instruments of indebtedness must not only (1) fall within one of the four classes of instruments described in the statute, namely (a) bonds, (b) debentures, (c) certificates of indebtedness, and (d) instruments bearing interest coupons or in registered form, but must also (2)

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[11] S.R. 617, 65th Cong. 3rd Sess. (accompanying H.R. 12863), CB 1939-1 (Part 2), p. 129.

[12] The Solicitor concluded: "The premises lead inevitably to the conclusion that it was not the intention of Congress to tax under subdivision 1 of the said Schedule A every evidence of indebtedness other than those included under the heads of shares or certificates of stock, promissory notes, or bills of exchange, but only those evidences of indebtedness which have the general character of investment securities and which may properly be included under the term 'bonds of indebtedness'. The definition of 'certificate of indebtedness' as 'primarily any instrument acknowledging liability for the payment of money, not in the recognized form of a promissory note or bill of exchange', contained in T.D. 2713, is too inclusive and does not sufficiently delimit the instruments included in the term. It is therefore held that the term 'certificate of indebtedness' as used in subdivision 1 of Schedule A, Title XI, Revenue Act of 1918, includes only instruments having the general character of investment securities. . . ."

be such as are known generally as corporate securities."[13]

It is submitted that the statute should be interpreted in accordance with the applicable Committee statements, the original Treasury interpretation, and the rule of the *Wilkinson* case afterward adopted by the Bureau, whatever may be the subsequent view of the Bureau unsupported by the legislative history.[14]

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[13] G.C.M. 11794, XII-1 C.B. 425.

[14] In regard to the *General Motors* case, which is the bulwark of the Commissioner's attempts to expand the statute, it seems appropriate to refer to another seemingly unwarranted statement which the decision contains. Referring to the abolition in 1924 of the stamp tax on promissory notes, the Court said * (before finding the "notes" to be taxable debentures):

"This statute was amended several times before the tax on promissory notes was repealed as above stated, but promissory notes were never included in the paragraph taxing bonds, debentures, and certificates of indebtedness. This treatment of promissory notes indicates that what was repealed when the tax on such notes was eliminated was taxation which covered the notes used customarily in day to day commercial transactions of a short time credit character and not instruments, whether called notes or something else, by which a corporation obtained capital for a substantial period of time from investors for general use in its business just as it might by the sale of it bonds, debentures or similar securities. . . ." For a contrary view of what Congress intended, see 39 Va. L.R. No. 2 *opus, cit. supra,* at p. 201: ". . . But the tax on promissory notes was repealed in 1924 and has never been reenacted. At that time Congress made it clear that it was repealing the tax on *all* promissory notes, both corporate and individual, long term and short term. . . ." Citing 65 Cong. Rec. 3277—9, (1924).

It should be observed that the tax on promissory notes had last appeared as paragraph 5 of Schedule A of Title XI of the Revenue Act of 1921, taxing drafts or checks *not* payable on sight or demand, and promissory notes. The 1921 Act had exempted promissory notes secured by United States obligations issued after April 24, 1917, etc. Such notes, by implication taxable unless exempted, could obviously have run for a long fixed period.

See also the very recent case of *Leslie Salt Co.* v. *United States* (ND Cal., 1953), 110 Fed. Supp. 680 at 681: "There was a time when promissory notes issued in commercial transactions were subject to the payment of stamp taxes. These taxes however were later repealed. And now stamp taxes are payable only upon corporate securities as defined in 26 USC 1801."

* 161 Fed. (2d) 593 at 595.

The view of the *Wilkinson* case receives support in *Hamilton National Bank* v. *U. S.* (CCA-6, 1938), 99 Fed. (2d) 570. In that case the Court dealt with registered, assignable mortgage participation certificates having the physical form of corporate securities. The Court found them to be taxable for a composite reason under the Revenue Act of 1926, saying:*

"While the participating certificate falls within the broader definitions of bond, debenture, and corporate security given in certain standard dictionaries and digests . . . we rest our decision upon the proposition (1) that it is a certificate of indebtedness, and (2) that it falls within the class of instruments known generally as corporate securities and described in the last clause of the schedule."

Again, in *Central States Life Ins. Co.* v. *Sheehan* (CCA-8, 1941), 117 Fed. (2d) 46, the Court, in taxing an issue of corporate bonds secured by mortgage, relied similarly on a composite reason under the same Act:**

". . . we think that the transaction here involved is within the purview of the statute and that the bonds are 'corporate securities' subject to the stamp tax."

The instruments issued by petitioner do not have the characteristics of corporate securities—see the description of them on p. 6 above. It is submitted that the Court below erred in holding them to be taxable while recognizing that they were not known as corporate securities within the statute.

(b) *In declaring that negotiability or assignability is not necessary for instruments to be taxable, the decision of the Court below is again in conflict with the* Wilkinson *decision, and also with that of the Third Circuit in* Dauphin Deposit Trust Co. *v.* United States, (CCA-3, 1935), 80 Fed. (2d) 893.

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* At p. 573.
** At p. 47.

After holding that an instrument is not taxable unless it is "known generally as a corporate security" [15] the Circuit Court in the *Wilkinson* case further declared that it must appear from the whole instrument that it is one known as a corporate security, adding: [16]

"We have not known of a corporate security that has not: (1) negotiability; (2) a fixed or ascertainable time of full payment, and (3) a fixed sum to be repaid. The instrument here does not have any one of those things. It is not negotiable, nor is there any intent that it be negotiated . . ."

In the *Dauphin Deposit* case, in finding certain mortgage participation certificates issued in transactions of a "restricted, nonassignable character" not to be taxable, the Third Circuit said: [17]

"The certificate has not the 'interest coupons', nor is it 'in registered form' as specified by the statute. It was not, and could not from its nature be, sold in security exchanges and, being of this local, individual character, it never did or never could be known as a corporate security."

This statement, taken in conjunction with the view of the same Circuit set forth in the previous decision of *Bellefield Co.* v. *Heiner, infra,* that an instrument to be taxable under the statute must have coupons or be in registered form, indicates that the statement in the *Dauphin Deposit* case of the need for salability would have been applied by the Court to all instruments tested under the statute.

Ignoring these aspects of the *Wilkinson* and *Dauphin Deposit* cases, the Court below took the view that the negotiability or assignability of corporate securities is not determinative of taxability.

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[15] 13 Fed. (2d) 997 at 998.
[16] P. 999.
[17] 80 Fed. (2d) 893 at 896.

Even assuming *arguendo* that the Court in the *Wilkinson* case meant to require only the alternative of strict negotiability or of assignability, yet the instruments issued by petitioner in the instant case fell essentially within the rule of both the *Wilkinson* and *Dauphin Deposit* cases for the reason that they could not be *transferred* by the parent corporation as holder without the consent of the City of New York for a period ranging from five to twenty-five years from the time of the completion of the project, and even within such period only if the petitioner waived its partial municipal tax exemption and paid retroactive tax for previous years as if there had been no exemption. The prohibition against assignment was for the benefit of the City, made the instruments essentially nonassignable, utterly incapable of being "sold in security exchanges", and distinctly of a "local, individual character." *(Dauphin Deposit Trust Co.* v. *United States, supra.)*

For these reasons it is submitted that the Court below erred in holding the instruments taxable in the face of their essential nonassignability. A very recent District Court decision also supports petitioner's position. In *Shamrock Oil & Gas Co.* v. *Campbell* (D.C. N.D. Tex., 1952), 107 Fed. Supp. 764, holding a long-term note not to be a "debenture" within the statute, the Court emphasized the need of negotiability (p. 766):

"The instrument itself, must carry marks or necessary elements of negotiability on its own face, and not otherwise. Negotiability cannot be determined by custom of dealing or, treating with certain commercial instruments."

(c) *In rejecting the attributes of interest coupons and of registered form as alternative requirements for the taxation of instruments as "bonds, debentures, or certificates of indebtedness," the decision below is in conflict with the*

decision of the Third Circuit in Bellefield Co. *v.* Heiner (CCA-3, 1928), 25 Fed. (2d) 560.

In that case the Court said (p. 562) (emphasis supplied):

"Turning to the quoted provision of the Revenue Act for guidance, we find a more or less complete definition of taxable instruments under the heading of bonds, *the critical parts being that an instrument taxable as a bond must be issued by a corporation with interest coupons or in registered form.* The instrument in question was issued by a corporation but is without interest coupons and not in registered form. If this were all that is available to throw light on the subject authoritatively, we should hold that the instrument in suit falls outside the statutory definition of a bond and must therefore be a note." (The additional element present was the fact that the Court deemed the then applicable regulations to make the instrument a note).

The *Bellefield* decision is tersely described in *Royal Loan Co.* v. *United States* (CCA-8, 1946), 154 Fed. (2d) 556 at 558:

"The notes involved in that case were held not taxable, not because they were not corporate securities, but because they were neither in registered form nor had coupons attached."[18]

In addition, the decision of the Third Circuit in *Dauphin Deposit, supra,* seems again to show its view that coupons or registration are conditions of taxability. Referring to the certificate there involved, the Court said:[19]

"The certificate has not the 'interest coupons', nor is it 'in registered form' as specified by the statute."

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[18] At least as late as 1944, the Bureau recognized in private rulings that instruments called "notes" were not taxable if they bore no interest coupons and were not in registered form. This seems to have been the considered view of the Department at that time.

[19] 80 Fed. (2d) 893 at 896.

The Court below failed to follow the foregoing rule when it found that only instruments known generally as corporate securities need have coupons or be in registered form to be taxable, and that the requirement does not apply to bonds, debentures, and certificates of indebtedness.

Apart from the judicial conflict, the view of the Court below seems to run against the legislative history described on pages 11 and 12 above—consider particularly the Committee's declaration of 1918 that the stamp tax provision was being reenacted and the clarification of the statute's scope by the Internal Revenue Code through the change of its title to "Corporate Securities", when the body of the statute referred to "bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities. . . ."

It has become a fixed habit of Congress, when speaking of instruments bearing coupons or in registered form, to lump together bonds, debentures, and certificates of indebtedness with other corporate instruments. In this connection, the Court is referred to the following provisions of the Internal Revenue Code set forth in the Appendix: sections 23 (k) (3) (relating to deduction from gross income because of worthless securities); 23(k) (5) (providing for deduction on account of worthless securities of affiliated corporations); 117 (f) (relating to gain or loss on retirement of bonds); 117 (i) (concerning losses sustained by banks on bonds); 125 (d) (regarding amortization of bond premiums). The pattern is well defined.

For these reasons, it is submitted that the Court below erred in taxing instruments which it had found neither to have coupons nor to be in registered form.

(d) *In declaring that the instruments are taxable as long-*

term investments, the decision below is in conflict with the decisions of the Seventh Circuit in Belden Mfg. Co. *v.* Jarecki (CCA-7, 1952), 192 Fed. (2d) 211; *of the Fifth Circuit in* Allen *v.* Atlanta Metallic Casket Co. (CCA-5, 1952), 197 Fed. (2d) 460; *and of the Eighth Circuit in* United States *v.* Ely & Walker Dry Goods Co. (CCA-8, 1953), 201 Fed. (2d) 584.

The Court below recognized the conflict with *Ely & Walker* (R. 26-7):

"The income debenture certificates . . . represent a long-term [20] investment. . . . As such, it is believed that . . . the instruments were subject to stamp tax. Cf. *United States* v. *Ely & Walker Dry Goods Co.*, 201 Fed. (2d) 584." (decided Feb. 5, 1953).

There seems to be no other decision taxing instruments simply for the reason that they are representative of "a long-term investment." The term is not present in the statute.[21] The Court below seems to have construed instru-

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[20] As used in the business world the phrase "long-term" in connection with loans and advances of money refers to instruments evidencing a loan or advance some part of which is not repayable within a year. See 39 Va. L.R. No. 2, *opus cit. supra* at p. 199, citing Jacoby and Saulnier, Term Lending to Business 9 (1942).

[21] See *Crooks* v. *Harrelson* (1930), 282 U.S. 55, at p. 61:

". . . the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness." Note, however, that the Court of Claims below shied away from finding the instruments to be "technically 'debentures' or 'certificates of indebtedness' ". (R. 28) See also at p. 60 the statement that to justify a court's departure from the terms of a tax statute "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail". As to sec. 1801, I.R.C., there is absolutely nothing even to adumbrate such intent. See also *United States* v. *Merriam* (1923), 263 U.S. 179 at 187:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words em-

ments representing a long-term investment as *perforce* something more than "mere evidences of debt".** On this basis it upheld the Commissioner's ruling, made without specification of reasons, that the instruments were taxable either as debentures or as certificates of indebtedness, apparently without certitude as to which.

In the *Belden, Allen* and *Ely & Walker* cases, long-term instruments running respectively for five, ten and eight years, without coupons and not in registered form, printed on plain white paper, and not sold for investment purposes, were held not taxable against the Government's contention that they were "debentures" under the statute. As in the instant case, the parties treated the advances as "loans".[22]

In taxing the instruments as representative of a "long-term investment", the Court below seems to have relied mainly on *General Motors Acceptance Corp.* v. *Higgins,* (CCA-2, 1947), *supra,* and *Commercial Credit Co.* v. *Hofferbert* (CCA-4, 1951), *supra.*

The *General Motors* case, holding instruments running for five years or somewhat less, to be taxable, is distinguishable from the foregoing decisions because it involved highly

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ployed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." (Citing *Gould* v. *Gould,* 245 U.S. 151, 153, and *Partington* v. *Attorney General,* L.R. 4 H.L. 100, 122).

The *Crooks* and *Merriam* cases are more relevant than *Raybestos-Manhattan Inc.* v. *United States,* (1935), 296 U.S. 60, cited by the Court below to justify its departure from "technical refinements." * The latter case, decided under the statutes taxing transactions concerning shares of stock, justified such departure only to prevent the simultaneity of issue and transfer from merging two taxable acts into one. It was not concerned with nomenclature of taxable categories.

* R. 27.

** R. 26-7.

[22] See Par. 302 of Agreement set out in lower Court's Findings of Fact at R. 30: "Metropolitan shall from time to time lend to the Corporation moneys,"etc.

formal, authenticated, transferable long-term instruments sold to the best bidders in the manner of a public distribution of corporate securities. The Court in that case emphasized that the terms, appearance, and method of sale of the instruments combined to put them in a class of "debentures" as a type of corporate securities under the statute.[23]

Commercial Credit, holding a fifteen year transferable instrument to be taxable as a "debenture" is also distinguishable because the holder had an option to require the exchange of the instrument for formal debentures covered by a trust indenture.[24] Such a provision is absent from the instant case and from *Belden, Allen,* and *Ely & Walker.*

The *Belden* case was followed very recently by District Courts in *Shamrock Oil & Gas Co.* v. *Campbell* (DCND Tex., 1952), *supra,* and *Leslie Salt Co.* v. *United States* (DCND Cal., 1953) 53-1 USTC par. 9188.[25] In *Leslie,* the Court construed instruments evidencing *insurance loans,* accompanied by complicated underlying agreements. The Court found them not to be "the kind of collateral or trust agreements traditionally used as the foundation or basis for the issuance of corporate obligations or securities." • • • This statement applies fully to the underlying agreement in the instant case. The Court in the *Leslie* case, following *Allen, Belden,* and *Shamrock* in preference to *General Motors* and *Commercial Credit,* found that the instruments were not "debentures" and were not taxable.

Finally, in *United States* v. *Ely & Walker Dry Goods Co., supra,* the Court of Appeals for the Eighth Circuit refused to hold eight-year instruments containing various covenants and agreements to be taxable as "debentures",

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[23] 161 Fed. (2d) 593 at 596.

[24] This inclined the Court to treat the original instrument as already in substance a group of debentures.

[25] 110 Fed. Supp. 680 • • • p. 681.

distinguishing *General Motors* as involving a transaction for the sale and purchase of corporate securities, and showing that *Commercial Credit* treated of an instrument giving an option to demand in exchange for it, debentures secured by a trust indenture.

For the foregoing reasons, it is submitted that mere length of term is not enough to make an instrument taxable, but that it must at least have properties associated with corporate securities—such as the fact of sale to the best bidders, formality of appearance, free transferability, a public distribution, a possible substitution of true debentures secured by a formal trust indenture, or a collateral or trust agreement traditionally used as the basis for the issuance of corporate securities. No such element is present in the case at bar.

II. *The decision of the Court below does not give proper effect to the decisions of this Court in* United States *v.* Isham (1873), 84 U. S. 496, *and* Lederer *v.* Fidelity Trust Co. (1925), 267 U. S. 17, *which declare respectively that the words of a stamp tax statute "are to be taken in the sense in which they will be understood by that public in which they will take effect", and that the words of the statute refer to "common speech".*

The Court below failed to give effect to these two cases, declaring the instruments to be taxable in the face of its finding (see R. 23) that they "are not of the type known generally to those who deal in the corporate security trade as bonds, debentures, certificates of indebtedness, or corporate securities."

The Court's conclusion of taxability was also made despite its finding (see R. 38-9) that the instruments enumerated in the statute dealt in by brokerage and investment concerns are assignable and usually negotiable, whereas

the petitioner's instruments were nonnegotiable and could be assigned by Metropolitan only with the consent of the City.

The *Isham* case established the rule that the words of a stamp tax statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. The *Lederer* case, referring to the predecessor of the present statute contained in the Revenue Act of 1918, declared that the words of the statute refer to common speech. Instruments such as bonds, debentures, certificates of indebtedness, and corporate securities in general take effect most often among the corporate security trade, and it is from that trade that the public at large derives its concepts of the terms and uses the terms so conceived in common speech. Consequently the Court below should have found the instruments to be free from tax under the *Isham* and *Lederer* cases. It is urged that this Court apply the common sense rules of these two decisions to the instruments at bar.

III. *The case raises important questions of Federal law which have not been, but should be, settled by this Court.*

Judicial construction by the Courts of Appeals of Section 1801 and its predecessors has resulted in confusion. Seemingly unwarranted suppositions of Congressional intent have led to uncertainty as to the statute's scope. Each year in this country a multitude of corporations issue thousands of instruments without knowledge as to whether they are properly taxable under the conflicting decisions of the Courts. The Commissioner himself has not hewed to any definitive line. There is considerable recent litigation under the statute, and arguments constituting potential suits are

rife at the administrative level.[26] Widespread litigation can be expected until the proper construction of the statute is settled. Moreover, resolution of the problem will aid a vexed Treasury in the proper administration of the statute. For these reasons it is submitted that the questions of Federal law raised by the case are important questions, meriting the cognizance of this Court with a view to clarification of the meaning of the statute. These questions, with one exception, have been discussed above under other captions. There remains the question whether the Court below properly taxed the instruments as "investment securities".

(a) *The Court below erred in taxing the instruments as investment securities.*

Although the Court below expressly refrained (see R. 28) from deciding whether the instruments are "technically" debentures or certificates of indebtedness, it found that their "terms and purposes" made them taxable as investment securities.

The finding that the instruments are "investment securities" cannot be construed as a finding that they are the equivalent of the statutory expression "corporate securities," because the Court had said (R. 24) that corporate securities under the statute must have coupons or be

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[26] See 39 Va. L. R., *op cit. supra*, at pp. 197-8: ". . . the Bureau of Internal Revenue appears to be disregarding the *Belden* case in every instance, except of course, in the Seventh Circuit. The determination of this question is of considerable importance to the banks[a] of this country, for with over five billion dollars of such loans outstanding, the amount of the tax, if applicable, would be substantial. However, until either the statute is made more explicit or the Supreme Court clarifies this section there will be a question as to whether term loan notes[b] are within Section 1801."

[a] The matter is also of great importance to insurance companies, as in the instant case.

[b] There will be the same question in regard to obligations evidencing long-term advances by insurance companies.

in registered form, and both these attributes were found to be absent. Under the rule of *Crooks* v. *Harrelson, supra,* the Court should have found the instruments to be something specified in the statute as taxable, or have granted judgment for petitioner.

As to the *terms* of the instruments (including the underlying agreement) they included language of essential non-assignability, with resultant absence of marketability. The *purposes* of the instruments were to evidence amounts advanced from time to time by Metropolitan to petitioner, its subsidiary. A demand note for borrowed funds is taken by the holder for the same purpose of evidencing a loan, yet such a note is clearly free from tax.[27]

The Comptroller of the Currency tried a few years ago a definition of the term "investment securities" under power given to him by Section 5136 of the Revised Statutes,[28] regulating transactions by banks in such items. He emphasized that an investment security must be a *marketable obligation,* i. e., salable under ordinary circumstances with reasonable promptness at fair value.[29] The instruments issued by petitioner run far afield of this requirement.

If the Court below meant that the instruments, although not "technically" debentures or certificates of indebtedness, yet are somehow, as "investment securities", "non-technical" debentures or certificates of indebtedness, it ignored the rule of *Crooks* v. *Harrelson* and of *United States* v. *Merriam* set forth above. Petitioner's instruments are not "debentures" within the decided cases. *General Motors* and *Commercial Credit* have already been

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[27] See footnote 14 on page 13.

[28] See pertinent part of statute in Appendix, p. 33.

[29] The full definition is found at Vol. 2, CCH Federal Banking Law Reporter, par. 49118, pp. 28108-9.

distinguished at pp. 20 and 21 above.[30] No authority can be found for holding them to be certificates of indebtedness. As the Treasury still recognizes in its excess-profits tax regulations, certificates of indebtedness include only "instruments having the general character of investment securities issued by a corporation. . . ." (Reg. 130, Sec. 40.439-1). It once made the same admission for purposes of stamp tax (Reg. 71 (1926) Art. 19; Reg. 71 (1932) Art. 19; L. O. 909, S. T. 1-20-85, modifying T. D. 2713; G. C. M. 11794, XII-1 C. B. 425).

The only reported decisions which petitioner can find holding instruments to be "certificates of indebtedness" and subject to the stamp tax are *National Thrift Corp. of America* v. *Welch* (D C S D Cal., 1931), 56 Fed. (2d) 1077, and *Hamilton National Bank* v. *United States* (CCA-6, 1938), *supra*. The *National Thrift* case involved assignable, registered, widely distributed certificates called Collateral Trust Secured Thrift Certificates secured by real estate under a collateral trust agreement with a corporate trustee. The Court found[31] that the instruments were, under the 1926 Act, "certificates of indebtedness and instruments issued in registered form and were known generally as corporate securities." In their assignability, registration and distribution they differed in basic characteristics from the instruments at bar. Yet even then the Court was unwilling to tax them without finding them to be known generally as corporate securities.

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[30] Moreover, see *Barton National Bank* v. *Atkins* (1899), 72 Vt. 33 at 45, declaring that a debenture ordinarily is an obligation of corporations or large moneyed co-partnerships, *issued in a form convenient to be bought and sold as investments; Weinstein* v. *Siemens* (DCEDNY), 26 Fed. Supp. 410, treating of typical debentures *with coupons; Lorimer* v. *McGreevy* (1935), 229 Mo. App. 970, 84 S.W. (2d) 667 at 669, stating that a debenture usually has coupons attached to facilitate payment of interest; showing (669) the three types of debentures none of which includes the instruments issued by petitioner (Green's Brice's Ultra Vires (2d Am. Ed.) p. 230).

[31] p. 1079.

The decision in the *Hamilton Bank* case is set forth above (p. 14). As in *National Thrift,* the Court was unwilling to tax a "certificate of indebtedness" except upon the finding [32] that "it falls within the class of instruments known generally as corporate securities. . . ."

Conclusion

In view of the general confusion prevailing in the business and financial communities as to what instruments, among the many thousands of "long-term" ones issued by corporations each year, are properly taxable under the conflicting precedents of the Courts and the changing attitude of the Treasury, it is respectfully submitted that the instant case offers to the Court an occasion to resolve the conflicts which becloud the import of the statute, and that such resolution is sorely needed. Until the meaning of the statute is clarified, the Treasury will be left in uncertainty, and litigation will continue. Viewed against the multitude of "long-term" instruments constantly being issued, the proper construction seems to present a question of substantial commercial importance.

Wherefore, your petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

EUGENE MEACHAM,
Counsel for Petitioner,
824 Connecticut Avenue, N. W.,
Washington 6, D. C.

DANIEL O. DECHERT,
of Counsel,
824 Connecticut Avenue, N. W.,
Washington 6, D. C.

No. 246

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[32] p. 573.

APPENDIX

(Here follows 1 photolithograph, Exhibit A)

No. 246 $_____

Stuyvesant Town Corporation

4½% Income Debenture Certificate

Due January 1, 1984.

STUYVESANT TOWN CORPORATION (hereinafter called the Corporation), a redevelopment company duly organized and existing under and pursuant to the Redevelopment Companies Law of the State of New York hereby certifies that it is indebted to Metropolitan Life Insurance Company in the principal sum of

_____ DOLLARS ($_____)

and hereby promises to repay said principal sum on or before January 1, 1984, and to pay interest on said principal sum, or the unpaid portion thereof, at the rate of four and one-half per centum (4½%) per annum from the date hereof at the times and to the extent provided in a contract (hereinafter called the Contract), entered into as of June 1, 1943, by and between The City of New York, the Corporation, and Metropolitan Life Insurance Company.

Payment of the principal of, and the interest on, this certificate shall be made at the home office of Metropolitan Life Insurance Company in the Borough of Manhattan, City and State of New York, in such coin or currency of the United States of America as at the time of the payment shall be legal tender for the payment of public and private debts.

This certificate is one of a number of income debenture certificates issued or to be issued pursuant to the Contract. The debenture certificates are issuable in any denomination or denominations and the several denominations of debenture certificates are interchangeable as provided in the Contract.

This certificate is entitled to the benefit of the provisions contained in the Contract relating to the accrual, accumulation and payment of interest and amortization, and the principal hereof, or any portion thereof, is subject to prepayment by application of amortization and other payments to be made by the Corporation at the times and to the extent provided in the Contract.

IN WITNESS WHEREOF, Stuyvesant Town Corporation has caused this certificate to be signed by its duly authorized officers.

STUYVESANT TOWN CORPORATION

Dated: _____, 194___.

By .....

.....

28A

Federal Statutes

Stamp Tax Statutes

Internal Revenue Code

Sec. 1800. Imposition of Tax.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

Sec. 1801. Corporate Securities.

On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 11 cents: . . .

REVENUE ACT OF 1917

Sec. 1100. That . . . there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, . . . the several taxes specified in such schedule.

SCHEDULE A.—STAMP TAXES.

1. Bonds of indebtedness: Bonds, debentures, or certificates of indebtedness issued . . . by any person, corporation, partnership, or association, on each $100 of face value or fraction thereof, 5 cents: . . .

6. Drafts or checks payable otherwise than at sight or on demand, promissory notes, except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding $100, 2 cents; and for each additional $100 or fractional part thereof, 2 cents.

REVENUE ACT OF 1918

Sec. 1100. That . . . there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Title . . . the several taxes specified in such schedule.

SCHEDULE A.—STAMP TAXES

1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: . . .

6. Drafts or checks (payable otherwise than at sight or on demand) upon their acceptance or delivery within the United States whichever is prior, promissory notes, except bank notes issued for circulation, and for each re-

newal of the same, for a sum not exceeding $100, 2 cents; and for each additional $100, or fractional part thereof, 2 cents.

This subdivision shall not apply to a promissory note secured by the pledge of bonds or obligations of the United States issued after April 24, 1917 . . . : *Provided,* That . . . the par value of such bonds or obligations shall be not less than the amount of such note.

Revenue Act of 1921

Sec. 1100. That . . . there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title . . . the several taxes specified in such schedule. . . .

Schedule A.—Stamp Taxes

1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: . . .

5. Drafts or checks (payable otherwise than at sight or on demand) upon their acceptance or delivery in the United States whichever is prior, promissory notes, except blank notes issued for circulation, and for each renewal of the same, for a sum not exceeding $100, 2 cents; and for each additional $100, or fractional part thereof, 2 cents.

This subdivision shall not apply to a promissory note secured by the pledge of bonds or obligations of the United States issued after . . .

Revenue Act of 1924

Sec. 800. . . . there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described

in Schedule A of this title . . . . the several taxes specified in such schedule . . . .

SCHEDULE A.—STAMP TAXES

1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: . . . .

REVENUE ACT OF 1926

Sec. 800 . . . . there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title . . . . the several taxes specified in such schedule . . . .

SCHEDULE A.—STAMP TAXES

1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: . . . .

NON-STAMP TAX SECTIONS

Sec. 23(k) Bad Debts.—

(3) Definition of Securities.—As used in paragraphs . . . the term "securities" means bonds, debentures, notes, or certificates, or other evidences of indebtedness, issued by any corporation . . ., with interest coupons or in registered form.

(5) Securities of Affiliated Corporations.—Bonds, debentures, notes or certificates, or other evidences of indebtedness issued with interest coupons or in registered form by any corporation affiliated with the taxpayer shall not

be deemed capital assets for the purposes of paragraph . . . .

Sec. 117. Capital Gains and Losses.—

(f) Retirement of Bonds, etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation . . ., with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

(i) Bond, Etc., Losses of Banks.—For the purposes of this chapter, in the case of a bank, ... if the losses of the taxable year from sales or exchanges of bonds, debentures, notes, or certificates, or other evidence of indebtedness issued by any corporation . . . . with interest coupons or in registered form, exceed the gains . . . .

Sec. 125. Amortizable Bond Premium.

(d) Definition of Bond.—As used in this section, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation and bearing interest . . ., with interest coupons or in registered form. . . .

REVISED STATUTES

Sec. 5136 . . . . As used in this section the term "investment securities" shall mean marketable obligations evidencing indebtedness of any person, co-partnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency.

NEW YORK STATUTES

Redevelopment Companies Law of New York (as of 1943)

Sec. 3425. *Participation by certain corporations.*

One or more insurance companies shall have the power to organize, or cause to be organized, a redevelopment com-

pany formed pursuant to the provisions of this act, and to purchase for cash or to receive and hold in exchange for property, and to own and control, the stock or the income debenture certificates or both of any redevelopment company . . .

. . . .

An insurance company, instead of investing its funds in the stock and debentures or other obligations of a redevelopment company, may through direct ownership and/or lease acquire, own, construct, manage, or operate as an investment for such period as it may deem desirable, one or more projects . . . (This paragraph reflects 1947 addition to Law.)

Sec. 3404. *Redevelopment companies; how created.*

A redevelopment company may be created by three or more persons signing, acknowledging and filing a certificate which shall contain:

. . . .

Sec. 3420. *Condemnation.*

A municipality may take property by condemnation for a redevelopment company, provided the contract or contracts . . . contain a requirement that the company shall pay to the municipality all sums expended or required to be expended by the municipality in the acquisition of such real property . . .

Sec. 3415. *Procedure for submission and approval of plan or project*

. . . .

The contract shall regulate the rents to be charged for rooms in the project . . .

Sec. 3402. *Policy of state and purpose of act.*

. . . that the clearance, replanning and reconstruction, rehabilitation and modernization of substandard and insanitary areas and the provision of adequate, safe, sanitary and

properly planned housing accommodations in effectuation of official city plans by such corporations in these areas are public uses and purposes for which private property may be acquired for such corporations and partial tax exemption granted; that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

Sec. 3426. *Tax exemptions.*

The local legislative body of any municipality in which a project of such company is or is to be located may by contract agree with any redevelopment company to exempt from local and municipal taxes, other than assessments for local improvements, all or part of the value of the property included in such project which represents an increase over the assessed valuation of the real property, both land and improvements, acquired for the project at the time of its acquisition by the redevelopment company which originally undertook the project and for such definite period of years as such contract may provide. The tax exemption shall not operate for a period of more than twenty-five years, commencing in each instance from the date on which the benefits of such exemption first became available and effective.

. . . .

Sec. 3404. *Redevelopment companies; how created.*

A redevelopment company may be created by three or more persons signing, acknowledging and filing a certificate which shall contain:

. . . .

3. The amount of the capital stock, and if any be preferred stock, the preference thereof.

. . . .

14. A declaration that, after providing for all expenses, taxes and assessments, there shall be paid annually out of

the earnings of the redevelopment company for interest, amortization, depreciation and dividends, a sum equal to but not exceeding six per centum of the total actual final cost of the project as defined by subdivision two of section thirteen of this act; that the obligation in respect of such payments shall be cumulative, and any deficiency in interest, amortization, depreciation and dividends in any year shall be paid from the first available earnings in subsequent years; and that any cash surplus derived from earnings remaining in the treasury of the redevelopment company in excess of the amount necessary to provide such cumulative annual sums shall, upon dissolution of the company, be paid into the general fund of the municipality.

Sec. 3412. *Mortgages and mortgage bonds.*

Any redevelopment company, subject to the approval of the supervising agency, may borrow funds and secure the repayment thereof by bond and mortgage or by an issue of bonds under a trust indenture . . .

Sec. 3411. *Income debentures.*

With the approval of the supervising agency, the certificate of incorporation, or an amended certificate, may authorize the issuance of income debenture certificates bearing no greater interest than six per centum per annum. Such income debenture certificates and any instrument under which they are issued may contain such other provisions, including provision for amortization by serial maturities, through the operation of a sinking fund or otherwise, as may be approved by the supervising agency.

Sec. 3415. *Procedure for submission and approval of plan or project.*

. . . .

After action thereon by the planning commission, such plan or plan of a project with a proposed form of contract between the municipality and the company, or, when all stock, debentures and mortgage bonds of the company are owned or are to be owned by one or more insurance companies, between the municipality, redevelopment company

and such insurance company or companies shall be submitted by the redevelopment company . . . to the local legislative body for its approval as to conformity with the provisions and purposes of the act, the extent of the tax exemption to be granted . . . the amount and nature of property to be condemned . . .

Sec. 3426. *Tax exemptions.*

. . . .

A redevelopment company which has been granted and has received tax exemption pursuant to this section may at any time elect to pay to the municipality the total of all accrued taxes for which exemption was granted and received, together with interest at the rate of five per centum per annum. Upon such payment the tax exemption of the project shall thereupon cease and terminate.

FEDERAL REGULATIONS

Reg. 130, Sec. 40.439-1. *Borrowed Capital.*

. . . .

(f) The term "certificate of indebtedness" includes only instruments having the general character of investment securities issued by a corporation . . .

Reg. 71 (1926) Art. 19 contains identical corresponding language in regard to stamp tax.

Reg. 71 (1932) Art. 19 is identical with its predecessor.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 167

STUYVESANT TOWN CORPORATION, A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19–28) is reported at 111 F. Supp. 243.

JURISDICTION

The judgment of the Court of Claims was entered April 7, 1953. (R. 19, 40.) The petition for a writ of certiorari was filed July 6, 1953, and was served September 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether "income debenture certificates" issued by the taxpayer corporation to an insurance com-

pany, its parent, evidencing long-term investment loans made to it by the parent, are subject to the stamp tax imposed by Sections 1800 and 1801 of the Internal Revenue Code "on all bonds, debentures, or certificates of indebtedness issued by any corporation."

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 1800. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

(26 U. S. C. 1946 ed., Sec. 1800.)

SEC. 1801 [As amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862; Section 209 of the Revenue Act of 1940, c. 419, 54 Stat. 516; and Section 521 (a) (3) of the Revenue Act of 1941, c. 412, 55 Stat. 687]. CORPORATE SECURITIES.

On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known gen-

erally as corporate securities, on each $100 of face value or fraction thereof, 11 cents: * * *

(26 U. S. C. 1946 ed., Sec. 1801.)

Treasury Regulations 71 (1941 ed.), promulgated under the Internal Revenue Code:

SEC. 113.50. *Scope of Tax.*—Section 1801 imposes a tax upon the issue by any corporation of bonds, debentures, certificates of indebtedness, and all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities. Every renewal of the above described instruments is taxable as a new issue.

SEC. 113.55. *Issues Subject to Tax.*—Ordinarily, a corporate instrument styled a bond, debenture, or certificate of indebtedness is subject to the tax. However, the taxability of an instrument is not determined by the name alone but depends upon all the circumstances, such as the name, form, and terms of the instrument, etc. Hence, an instrument, however designated, having all the essential characteristics of a bond, debenture, or certificate of indebtedness is taxable as such. Similarly, an instrument issued with interest coupons, or with provision for registration, and coming within the class known generally as corporate securities will be held subject to the tax regardless of the name by which it may be called.

* * * * *

STATEMENT

The facts, as found by the court below (R. 28–40), may be summarized as follows:

The taxpayer corporation was organized in 1943 as a wholly owned subsidiary of the Metropolitan Life Insurance Company (Metropolitan), pursuant to provisions of the Redevelopment Companies Law of New York,[1] for the purpose of rehabilitating substandard areas in New York City. Its authorized capital stock was ten shares of the par value of one hundred dollars each, in addition to which it was authorized to issue "income debenture certificates." (R. 28–29.)

On June 1, 1943, shortly after taxpayer's organization, the taxpayer, Metropolitan, and the City of New York entered into an agreement providing for the redevelopment by taxpayer of a substandard area in Manhattan and the erection thereon of apartment buildings, the project to be known as Stuyvesant Town. Title to the area was to be acquired by the City for the taxpayer, at the latter's cost. (R. 29–30.) The agreement specified in detail the respective rights and obligations of the parties. (R. 30–36.) It provided that taxpayer's "capital structure" should consist of not more than ten shares of stock of the par value of one hundred dollars each and limited to

[1] Chapter 2 of Title 11 of the Unconsolidated Laws of New York (Sections 3401–3426), enacted by Chapter 845 of the Laws of 1942, as amended by Chapter 234 of the Laws of 1943.

cumulative dividends of four and one-half percent, and of "income debenture certificates" in an amount equal to that part of the total final cost of the project which exceeded the par value of the stock (R. 30); that the debentures should mature January 1, 1984, bear four and one-half percent cumulative interest, and be amortized in designated amounts (R. 30–32); that Metropolitan should from time to time provide taxpayer with the necessary capital for the project, in exchange for taxpayer's debentures (R. 34); that Metropolitan should own all of the stock and debentures and, during the period of municipal tax exemption, should not transfer any of the stock or debentures without the City's consent (R. 34). The property devoted to the project was to be exempt from local taxes for a period of twenty-five years from completion of the project (R. 33), except that taxpayer might after five years from completion terminate the exemption upon specified terms (R. 35).

Taxpayer completed the project on July 1, 1949. During the progress of the work and in conformity with the agreement of June 1, 1943, Metropolitan loaned to taxpayer on forty-nine different dates varying amounts, each loan being evidenced by a "4½% Income Debenture Certificate." The certificates were identical in form, the only differences being the face amount, date of issuance, and the certificate number. They were on plain white paper, did not bear the seal

of the corporation, were not in registered form, and did not have interest coupons attached. On the back was space for the notation of amortization payments. (R. 36–37.) Metropolitan had the right to exchange any debenture certificate for others of equal amount but of different denominations. (R. 32, 37.) The debenture certificates were not in the form and of the character of those usually handled by brokers and investment concerns and known generally as bonds, debentures, certificates of indebtedness, or corporate securities. While the latter are assignable and usually negotiable, taxpayer's debentures were non-negotiable and could be assigned only in accordance with the terms of the agreement. (R. 38–39.)

The officers and directors of taxpayer are, with the exception of one who is the manager of the project, also officers and directors of the parent, Metropolitan. The common officers and directors are paid entirely by Metropolitan. Taxpayer has various employees of its own at the project, who are paid by it. (R. 37–38.)

As money was needed by taxpayer to carry out the project, the manager would advise taxpayer's secretary, who also was the general counsel of Metropolitan. The latter then requisitioned the certificate book which was kept in Metropolitan's vault, prepared the debenture certificate in the amount of funds required, requested Metropolitan's comptroller to draw a check for the amount,

and authorized the drawing of a check for the documentary stamps attributable to the issuance of the certificate. Thereupon taxpayer delivered to Metropolitan the executed debenture in exchange for Metropolitan's check, which was deposited in taxpayer's bank account. This procedure was followed in issuing each of the forty-nine certificates here involved. (R. 38.)

Prior to the issuance of any of the certificates, Metropolitan by letter requested a ruling as to whether they would be subject to stamp tax under Section 1801 of the Internal Revenue Code. The Commissioner ruled that they were taxable under that section "on either of two bases, that is as a debenture or as a certificate of indebtedness." Taxpayer paid sums aggregating $110,321.20 for documentary stamps which were affixed to the debenture certificates, and thereafter filed a claim for refund. The Commissioner rejected the claim (R. 39–40) and the Court of Claims upheld the Commissioner's determination. (R. 19–28, 40.)

ARGUMENT

1. The question here is substantially the same factual one which was presented in *General Motors Acceptance Corp.* v. *Higgins*, 161 F. 2d 593 (C. A. 2), certiorari denied, 332 U. S. 810, and the decision below is in accord with the decision in that case. See also *Commercial Credit Co.* v. *Hofferbert*, 93 F. Supp. 562 (D. Md.), affirmed *per curiam*, 188 F. 2d 574 (C. A. 4). Noth-

ing has occurred since the denial of certiorari in the *General Motors* case which would appear to warrant the granting of certiorari in this case, and there is no more occasion for further review of this case than of that one. Indeed, taxpayer here advances essentially the same arguments in support of its petition as were there offered.

2. The decision below is correct. Section 1800 of the Internal Revenue Code (*supra*, p. 2) provides generally for a documentary stamp tax. By Section 1801 (*supra*, pp. 2–3), the tax is imposed upon the issuance "by any corporation" of securities falling within either of two comprehensive groups: (1) "all bonds, debentures, or certificates of indebtedness"; or (2) "all instruments, however termed, * * * with interest coupons or in registered form, known generally as corporate securities." The legislative history of these provisions shows, as the court below pointed out (R. 24–25), that these two broad categories are separate and cumulative, and that to come within the first the instrument need not be known generally as a corporate security. See also *General Motors Acceptance Corp.* v. *Higgins*, 161 F. 2d at 596–597.[2] This construction is confirmed by the Treas-

[2] In 1926, the Court of Appeals for the Seventh Circuit reached a contrary conclusion in *Wilkinson* v. *Mutual Bldg. & Sav. Assn.*, 13 F. 2d 997. Not only has that decision never been followed by any other court of appeals, but in *Belden Mfg. Co.* v. *Jarecki*, 192 F. 2d 211, that court deprived the decision of any vitality in that circuit. For in the *Belden Mfg. Co.* case (involving the taxability of a corporate instru-

ury Regulations applicable since 1941 [Treasury Regulations 71, Secs. 113.50, 113.55 (1941 ed.) (*supra,* p. 3)], which must be deemed to have received implied legislative approval by virtue of the many subsequent amendments of other provisions of the Code without any change in the language of Section 1801, which it interprets.[3] See *Lykes* v. *United States,* 343 U. S. 118, 127.

The court below held (R. 28), as the Commissioner had ruled (R. 39–40), that the instruments here involved are subject to the stamp tax either as "debentures" or as "certificates of indebtedness." Neither the statute nor the Regulations attempt to prescribe an inflexible formula for

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ment under Section 1801), the court agreed with the Collector there that "whether [the instrument] is a *debenture subject to tax* or a note not liable for such tax, cannot be determined merely from the name or label which the parties have applied to the instrument." (Italics added.) 192 F. 2d at 212. Inasmuch as the instrument there was not "known generally as a corporate security," the court necessarily assumed that instruments which were not corporate securities could be taxed under Section 1801. Indeed, the court expressly stated that "The question for decision is dependent upon the particular facts of the case." (*Ibid.*)

[3] The Regulations provide that the tax applies to "bonds, debentures, certificates of indebtedness, *and* all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities" (Section 113.50); and that an instrument having all the "essential characteristics of a bond, debenture, or certificate of indebtedness is taxable *as such*," while one with interest coupons or in registered form and "coming within the class known generally as corporate securities" will be "*similarly*" taxed (Section 113.55). (Italics supplied.)

applying those terms in all situations. Whether an instrument is a debenture or certificate of indebtedness within the meaning of Section 1801 necessarily "depends upon all the circumstances, such as the name, form, and terms of the instrument, etc." Section 113.55 of Treasury Regulations 71 (1941 ed.). As generally understood and as used in the taxing statute, the term "debenture" embraces any corporate instrument evidencing a long-term investment loan, as distinguished from a short-term commercial loan which is usually evidenced by a promissory note. *General Motors Acceptance Corp.* v. *Higgins, supra; Commercial Credit Co.* v. *Hofferbert, supra.* Cf. *United States* v. *Ely & Walker Dry Goods Co.*, 201 F. 2d 584 (C. A. 8).

The undisputed facts of this case fully justify the trial court's conclusion that the instruments here in question "were intended to, and did, represent a long-term investment" in taxpayer corporation (R. 26–27), and that their "terms and purposes * * * combine to put them well within the class of investment securities which Congress intended to tax" (R. 28). The securities were issued by a wholly owned subsidiary (taxpayer) to its parent (Metropolitan), an insurance company, and were described by the parties as "income debenture certificates." They evidenced loans totaling over one hundred million dollars, which constituted substantially the entire capital

of the subsidiary, its only other capital consisting of a nominal amount (one thousand dollars) evidenced by stock certificates. The "debenture certificates" were issued exclusively to the parent, as were the stock certificates, and their transferability was restricted. They represented long-term obligations payable in 1984, bore four and one-half percent cumulative interest, and were amortizable in designated amounts. The loans which they evidenced were made for the purpose of financing a City-sponsored housing project, which the subsidiary had been organized to carry on. And the certificates were issued pursuant and subject to a tripartite agreement among the subsidiary, the parent, and the City, which imposed numerous restrictions upon the borrower-subsidiary for the protection of the lender-parent and the City. In these circumstances, the trial court's conclusion that the instruments in question constituted either "debentures" or "certificates of indebtedness" cannot be said to be clearly erroneous—especially since the parties themselves characterized the instruments as "debenture certificates." Here, as in the *General Motors* case (161 F. 2d at 596), the "terms, appearance, and method of sale to a comparatively few investors who were required to state at least their then present intention to hold them [so-called notes] for investment purposes without transfer to others combined to put them in a

class apart from ordinary commercial promissory notes and into the category of debentures as that term is used in the statute." See also *Commercial Credit Co.* v. *Hofferbert, supra.*[4]

3. The decision below is not in direct conflict with the decision of any other court. Since the applicability of the statute "depends upon all the circumstances" (Section 113.55 of Regulations 71), neither the presence nor the absence of any particular factor is controlling. Cf. *John Kelley Co.* v. *Commissioner,* 326 U. S. 521. As was stated in *United States* v. *Ely & Walker Dry Goods Co., supra,* p. 588—the most recent case with which taxpayer asserts conflict (Pet. 9, 19–22)—"When it is kept in mind that the taxability of an instrument depends on the substance of the transaction of which it is a part, any supposed conflict between [cases relied upon by taxpayer and the Government] disappears." And similar statements are to be found in others of the claimed conflicting decisions. See *Belden Mfg. Co.* v. *Jarecki,* 192 F. 2d 211, 214 (C. A. 7); *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893, 896 (C. A. 3). Recognizing that each case in this field has turned upon its own facts, the Government has refrained from applying for writs of certiorari in those decided adversely to it.

[4] The *Commercial Credit* case involved a loan by an insurance company, represented by a "promissory note," and the court followed the rationale of the *General Motors* decision. The instant case would seem to present an *a fortiori* situation, for here the loan was represented by "debenture certificates."

Moreover, the factual distinctions among these cases may be readily perceived. Thus, the "notes" in *Ely & Walker* (see Pet. 9, 19–21) were different from those involved in *General Motors* and *Commercial Credit* and from those in question here, inasmuch as they were "given in ordinary commercial banking transactions" and were "not sold for investment purposes." 201 F. 2d at 589. *Belden Mfg. Co.* (see Pet. 9, 19–21, 24) involved a promissory note,[5] which represented a bank loan made in the ordinary course of the bank's lending business rather than an investment by the bank. 192 F. 2d at 213. In *Dauphin Deposit Trust* (see Pet. 8, 14–17), the instruments were certificates evidencing part interests in a mortgage owned by a trust company, falling within the provision of the then applicable Treasury Regulations which exempted from

[5] So, too, were the instruments involved in *Allen* v. *Atlanta Metallic Casket Co.*, 197 F. 2d 460 (C. A. 5) (see Pet. 9, 19–21), and in *Bellefield Co.* v. *Heiner*, 25 F. 2d 560 (C. A. 3) (see Pet. 9, 10, 17). Thus, in *Atlanta Metallic Casket*, the Fifth Circuit, noting (197 F. 2d at 461) that taxability was "shrouded in, doubt," sustained the trial court's conclusion that a promissory note evidencing an ordinary commercial loan was not taxable as a debenture. In the *Bellefield Co.* case, the question for decision was (25 F. 2d at 561) whether "ordinary short-term promissory notes" given in exchange for bank loans were bonds within the meaning of the stamp tax provisions of the 1924 Revenue Act and the then applicable Treasury Regulations. Here, of course, no short-term bank loans are involved, nor is the question presented the same.

the tax an "instrument which merely represents an assignment of interest in a bond accompanying a mortgage." 80 F. 2d at 895–896. Finally, in *Wilkinson* v. *Mutual Bldg. & Sav. Ass'n, supra,* p. 8 n. 2 (Pet. 8, 10, 11, 14–16), the question was whether an instrument evidencing a loan by a building and loan association to its member was subject to the stamp tax imposed by the 1921 Act on "promissory notes," or to the larger tax imposed on "debentures" and other corporate securities. The court held that the instrument was taxable as a note, on the theory (13 F. 2d at 998) that it was taken in the ordinary and daily course of the association's lending business. The decision below, involving a long-term investment loan by an insurance company, is in no way inconsistent with that holding. (See also *supra,* p. 8 n. 2.)

In sum, there is no direct conflict of decisions on this essentially factual question. Each of the cited cases rests upon facts peculiar to it. If any factual comparison is to be drawn between this and other cases, it seems clear that the instant case bears a closer resemblance to *General Motors Acceptance Corp.* and *Commercial Credit,* in both of which taxes upon similar instruments were upheld, than to those upon which the taxpayer relies.

CONCLUSION

The decision below is correct. There is no direct conflict of decisions, and no occasion for review by this Court. The case turns on its own facts. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
HILBERT P. ZARKY,
HARRY BAUM,
Special Assistants to the Attorney General.

OCTOBER 1953.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 167

STUYVESANT TOWN CORPORATION, A CORPORATION, *Petitioner*

v.

THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

The brief of respondent makes three points:

First. The question here is substantially the same factual one which was presented in General Motors Acceptance Corp. v. Higgins (CA-2, 1947), 161 Fed. (2d) 593, certiorari denied, 332 U.S. 810, and the decision below is in accord with the decision in that case.

The "factual" question is very different. In the *General Motors* case, the instruments were of the formal appearance of investment securities on tinted paper with engraved borders, and were sold and distributed to various bidders in the fashion of investment securities. They were freely transferable in the same fashion. The instruments at bar lack all these characteristics. The decision below

is in accord with *General Motors* only in finding taxability and in construing the statute to tax "bonds, debentures, or certificates of indebtedness issued by any corporation", whether or not they are instruments "with interest coupons or in registered form, known generally as corporate securities." The Court of Appeals in *General Motors*, in finding the instruments there involved taxable as debentures, emphasized (p. 596) that "Their terms, appearance, and method of sale . . . combine to put them . . . into the category of debentures as that term is used . . . to designate a type of corporate securities . . ."[1]

In its first point, respondent relies also on *Commercial Credit Co.* v. *Hofferbert* (D.C. Md., 1950), 93 Fed. Supp.

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[1] Respondent's framing of the question (Br. 2) is truncated. The question is not whether the instruments at bar are subject to a tax laid "On all bonds, debentures, or certificates of indebtedness issued by any corporation," but whether they are subject to the tax laid "On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities."* Petitioner has shown (P. 10) that in *Wilkinson* v. *Mutual Bldg. & Sav. Assn.* (CA-7, 1926), 13 Fed. (2d) 997, the statute was held to apply only to instruments known generally as corporate securities; and (P. 17) that in *Bellefield Co.* v. *Heiner* (CA-3, 1928), 25 Fed. (2d) 560, it was held to apply only to instruments with interest coupons or in registered form. The court below found the instruments at bar to be "not of the type known generally to those who deal in the corporate security trade as bonds, debentures, certificates of indebtedness, or corporate securities." (R. 23). The facsimile of the instruments (P. 28A) shows that they had no coupons and were not in registered form. Petitioner has shown (P. 26) that the "income debenture certificates", a novel term introduced as a mark of distinction by the New York Legislature in connection with a novel kind of project (N.Y. Uncons. L. Ch. 2, T. 11, Sec. 3411) for the execution of a declared public use (Sec. 3402), were neither debentures nor certificates of indebtedness. It has shown (P. 6-7) that they could not have been known generally as corporate securities. There has been no allegation that they were bonds. This runs the gauntlet of the statute.

* Sec. 1801, Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 1801).

562, aff'd *per curiam* (CA-4, 1951), 188 Fed. (2d) 574. This case involved a transferable instrument, convertible at the holder's option into formal debentures covered by a trust indenture.[2] The instruments at bar are essentially non-assignable, and are not so convertible.

Respondent says (Br. 7-8) that "Nothing has occurred since the denial of certiorari in the *General Motors* case which would appear to warrant the granting of certiorari in this case . . . Indeed, taxpayer here advances essentially the same arguments in support of its petition as were there offered." On the contrary, much has occurred which would appear to warrant the grant. Since the *General Motors* decision, long-term instruments have been held nontaxable by appellate courts in *Belden Mfg. Co.* v. *Jarecki* (CA-7, 1951), 192 Fed. (2d) 211; *Allen* v. *Atlanta Metallic Casket Co.* (CA-5, 1952), 197 Fed. (2d) 460 (*involving a long-term instrument running to an insurance company as evidence of a loan*); and *United States* v. *Ely & Walker Dry Goods Co.* (CA-8, 1953), 201 Fed. (2d) 584; and in *Leslie Salt Co.* v. *United States* (D.C. N.D. Cal., 1953), 110 Fed. Supp. 680, a District Court in California applied the *Belden* and *Atlanta Metallic* decisions to instruments evidencing *loans by an insurance company* accompanied by complicated agreements not of "the kind . . . traditionally used as the . . . basis for the issuance of corporate obligations or securities" (p. 161), just as in the instant case.

Contrary to respondent's assertion (Br. 8), petitioner has gone far beyond the argument advanced in the petition for certiorari in the *General Motors* case (No. 347, October Term, 1947). The petitioner in that case alleged only two reasons for granting the writ: (1) a conflict between the

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[2] Petitioner has shown (P. 15) that the Court of Appeals in the *Wilkinson* case laid down the requirement of negotiability (i.e., negotiability or assignability) for taxability under the statute. In the *Commercial Credit* case, the court was strongly influenced by the provision for conversion into instruments of a higher degree of formality (P. 566).

court below and other circuits as to whether instruments could be taxed when they carried no coupons and were not in registered form;[3] (2) the public interest in and importance of the settlement of the scope of the stamp tax statute.[4] Petitioner in the instant case has raised these two reasons and also five other reasons (P. 8-9): (1) the conflict as to whether instruments can be taxed without being known generally as corporate securities;[5] (2) the conflict raised by the decision below as to whether instruments which are essentially non-assignable can be taxed;[6] (3) the conflict similarly raised as to whether instruments can be taxed merely because they represent a "long-term investment";[7] (4) the failure of the decision below to follow the decisions of this Court declaring respectively that the words of a stamp tax statute "are to be taken in the sense in which they will be understood by that public in which they will take effect", and that the words of the statute refer to "common speech;[8] (5) the error of the court below in taxing the instruments as "investment securities".[9]

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[3] Raised by petitioner hereby reference to *Bellefield Co.* v. *Heiner, supra,* a precedent in the negative (P. 8-9, 16-17).

[4] The present accentuated situation of confusion has been described by petitioner (P. 23-24).

[5] *Wilkinson* v. *Mutual Bldg. & Sav. Assn., supra,* in the negative.

[6] *Wilkinson* in the negative; also *Dauphin Deposit Trust Co.* v. *United States* (CA-3, 1935), 80 Fed. (2d) 893.

[7] *Belden, Atlanta Metallic,* and *Ely & Walker,* all involving "long-term" placing of money (*Atanta Metallic* by an insurance company), in the negative.

[8] *United States* v. *Isham* (1873), 84 U.S. 496, and *Lederer* v. *Fidelity Trust Co.* (1925), 267 U.S. 7.

[9] The rule of *Crooks* v. *Harrelson* (1930), 282 U.S. 55, and *United States* v. *Merriam* (1923), 263 U.S. 179, was thereby violated—(P. 19-20) apart from the error in nomenclature made by the court below (P. 25-26).

Second: The decision below is correct.

Respondent contends that the decision below is correct by merely repeating (Br. 8) the court's division of the statute into two parts—(1) bonds, debentures, or certificates of indebtedness; (2) instruments, however termed, with interest coupons or in registered form, known generally as corporate securities—and by referring in support to the legislative history of the statute, as interpreted by the decision below and by *General Motors*,[10] and confirmed by Treasury Regulations 71, Secs. 113.50, 113.55 (1941 ed.) (Br. 3). Respondent argues that this part of the regulations "must be deemed to have received implied legislative approval by virtue of the many subsequent amendments of other provisions of the Code without any change in the language of Section 1801, which it interprets"—citing *Lykes v. United States*, 343 U.S. 118, 127. Petitioner has shown (P. 11-13) that the legislative and administrative history, as well as the early judicial construction, tends to show that the phrase "known generally as corporate securities" was intended to modify all categories of named instruments.[11] Despite the *Lykes* decision, there can

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[10] Respondent, in a footnote (Br. 8) admits a conflict between *General Motors* and *Wilkinson, supra*, on this point.

[11] H.R.R. 767, 65th Cong., 2nd Sess. (accompanying H.R. 12863), C.B. 1939-1 (Part 2), p. 113; S.R. 617, 65th Cong., 3rd Sess. (accompanying H.R. 12863). C.B. 1939-1 (Part 2), p. 129; Law Op. 909, S.T. 1-20-85; G.C.M. 11794. XII-I C.B. 425. Consider also the following from an unpublished ruling of the Bureau of 1944 made by the Deputy Commissioner three years after the adoption of the 1941 regulations: "Under section 1801 of the Internal Revenue Code, as amended, a stamp tax is imposed upon the issuance of all bonds, debentures, or certificates of indebtedness issued by any corporation with interest coupons or in registered form, known generally as corporate securities. The notes in question are clearly not bonds, debentures, or certificates of indebtedness. In addition, they are not corporate securities within the meaning of the law since they do not bear interest coupons and are not in registered form. Accordingly, the notes issued by your corpora-

hardly be implied legislative approval of sections 113.50 and 113.55 of the Regulations. That decision reaffirms the familiar rule that an unequivocal regulation is entitled to great weight, especially if other sections of the same code have been amended subsequently to the issuance of the regulation

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tion to Metropolitan Life Insurance Company, under the circumstances stated, are not subject to the tax imposed by section 1801 of the law."

In footnote (Br. 8), respondent tries to depreciate *Wilkinson* v. *Mutual Bldg. & Sav. Assn. supra*, by reference to *Belden Mfg. Co.* v. *Jarecki, supra*, alleging as to *Belden* that "the court agreed with the Collector there that 'whether [the instrument] is a *debenture subject to tax* or a note not liable for such tax, cannot be determined merely from the name'" etc . In Belden, counsel for the appellee taxpayer relied on three propositions in their answering brief: (1) that the note was not a debenture; (2) that even if it was a debenture, it was not known generally as a corporate security; and (3) that even if it was a debenture, it was not with interest coupons and was not in registered form. The Court of Appeals stated (P. 212) that "Defendant . . . relies almost entirely upon the *GMAC* case and *Commercial Credit Co.* v. *Hofferbert*, 93 Fed. Supp. 562, wherein the facts were almost identical with those in *GMAC*." The Court's statement (P. 212) that "We agree with the defendant's argument that the character of the instrument in question, that is, whether it is a debenture subject to tax or a note not liable for such tax, cannot be determined merely from the name or label which the parties have applied to the instrument" was an expression *in limine*, and cannot possibly be construed as a rejection of appellee's second and third propositions. The court then disposed of the case by deciding that the instrument *was not even a debenture*, and did not have to reach the other propositions. It did not even cite the *Wilkinson* case. Respondent's statement in the footnote that the instrument involved in the *Belden* case was not "known generally as a corporate security" is misleading in that there was no ruling on the point. There is nothing in the *Belden* opinion to show that "the court necessarily assumed that instruments which were not corporate securities could be taxed under Section 1801" (Br. 9). The further statement of the court quoted in respondent's footnote that "The question for discussion is dependent upon the particular facts of the case", a rather manifest truism, establishes nothing by way of depreciation of *Wilkinson*.

without amendment of the section to which the regulation is servient, but it in no way restricts the equally familiar modification of the rule—that almost no weight will be given to departmental construction which is not uniform. *Merritt* v. *Cameron*, 137 U.S. 542;[12] *United States* v. *Healey*, 160 U.S. 136;[13] *Iselin* v. *United States*, 270 U.S. 245.[14] As

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[12] ". . . neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time . . . In regard to the law under consideration the construction of it by the Treasury Department has not been uniform . . ." (at p. 552).

[13] "But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the act of 1877, without reference to the practice in the Department." (at p. 145).

[14] This case involved the applicability of Sec. 800(a) of the Revenue Act of 1918 to certain tickets. In closing, this Court said (p. 251):

> "The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 20, 1920, the Attorney General sustained that ruling; that the provisions here in question were reenacted without substantial change in the Revenue Act of 1921, . . . and the Revenue Act of 1924, . . . and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law. Compare *United States* v. *Falk & Brother*, 204 U.S. 143; *National Lead Co.* v. *United States*, 252 U.S. 140, 146."

See also *Irrgang* v. *Fahs* (D.C. S.D. Fla., 1950), 94 Fed. Supp. 207 at 212:

> "The court is not bound to follow the provisions of the Treasury Departments rulings and regulations unless such are in conformity with the laws enacted by Congress. *Commissioner*

to the lack of uniformity in the departmental construction, see P. 12-13 and footnote (10), *infra.*

Contrary to respondent's statement (Br. 9) that the court below held the instruments to be taxable either as "debentures" or as "certificates of indebtedness", petitioner has clearly shown (P. 7) that the court below expressly refrained from such holding (R. 28): "We find it unnecessary to decide whether the income debenture certificates are technically 'debentures' or 'certificates of indebtedness'..."

In refutation of respondent's assertion (Br. 10) that the term "debenture" embraces any corporate instrument evidencing a long-term "investment loan", the Court's attention is directed to the *Belden, Atlanta Metallic, Ely & Walker, and Leslie Salt* cases, *supra,* and to P. 26 (footnote).

In reply to the last portion (Br. 10) of respondent's point that the decision below is correct, petitioner refers to P. 19 as showing that the taxation of the instruments by the court below as a "long-term investment" (R. 28)—a term not present in the statute—violates the rule of *Crooks* v. *Harrelson,* 282 U.S. 55, and *United States* v. *Merriam,* 263 U.S. 179; to P. 4 as showing that the New York Legislature itself chose the novel term "income debenture certificates," perforce used by the parties in the agreement providing for their issuance; and to respondent's own state-

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of Internal Revenue v. *Van Vorst,* 9 Cir., 59 F. 2d 677. In that case it was held, 59 F. 2d text 679: (1) It is well settled that department regulations may not invade the field of legislation but must be confined within the limits of congressional enactment. In *International Ry. Co.* v. *Davidson,* 257 U.S. 506, 514, 42 S. Ct. 179, 182, 66 L. Ed. 341, the court said: "Section 161 does not confer upon the Secretary any legislative power. *Morrill* v. *Jones,* 106 U.S. 466, 1 S. Ct. 423, 27 L. Ed. 267; *United States* v. *George,* 228 U.S. 14, 33 S. Ct. 412, 57 L. Ed. 712. A regulation to be valid must be reasonable and must be consistent with law" ' "

ment of the facts (Br. 4-7) as showing that, in distinction to the instruments involved in *General Motors*, there was complete difference of appearance because of the lack of formality of the instruments at bar, and no "sale" at all in a legislatively prescribed parent-subsidiary transaction involving the execution of a declared public use.[15]

Third: The decision below is not in direct conflict with the decision of any other court.

Respondent, before raising this point (Br. 12) has already admitted (Br. 8) that in 1926, the Court of Appeals for the Seventh Circuit reached in *Wilkinson, supra,* a conclusion contrary to that of *General Motors* as to whether instruments, to be taxable, must be known generally as corporate securities. This is clearly a direct conflict.

Ely v. *Walker,* to which respondent refers (Br. 12) as denying a conflict, denies it only as between *General Motors* and *Commercial Credit* on the one hand, and *Belden* and *Atlanta Metallic* on the other, upon the basis of differences in the instruments and agreements, and in the attendant circumstances, in the two pairs of cases. Petitioner has alleged no conflict between these two sets of decisions, but has expressly recognized them as distinguishable (P. 20-21). The conflict in this connection is between the decision below and *Belden, Atlanta,* and *Ely & Walker,* because the court below taxed the instruments at bar as a "long-term investment" (P. 18-22).

Respondent refers to *Belden* in the same manner, but *Belden* merely denies a conflict between itself and *General Motors and Commercial Credit.* Similar reference is made

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[15] In respect of respondent's reference to *Commercial Credit, supra,* as involving a "loan" by an insurance company, the Court is referred to P. 3, *infra,* where petitioner cites *Leslie Salt,* involving a long-term advance by an insurance company held non-taxable in the light of *Atlanta Metallic* and *Belden, supra,* and *Shamrock Oil & Gas Co.* v. *Campbell* (D.C. N.D. Tex., 1952), 107 Fed. Supp. 764, in preference to *General Motors* and *Commercial Credit.*

to *Dauphin Deposit Trust Co.* v. *United States* (CCA-3, 1935), 80 Fed. (2d) 893. The only denial of conflict there is between that decision and the decision of this Court in *Lederer* v. *Fidelity Trust Co., supra.* Petitioner recognizes the distinction between these cases, but contends that the decision below is in conflict with each of them (P. 14-16, 22-23).

As to respondent's assertion (Br. 12) that it has refrained from applying for certiorari in those cases decided adversely to it because it recognizes that each case in this field has turned upon its own facts, it should be observed that respondent in this manner has left itself open to claim, and is understood to be claiming, tax in disregard of the adverse decisions in those Circuits in which they have not been rendered. Every case turns in part on its own facts, but respondent's assertion ignores the several views of the statute with which the decision below conflicts (see summary of conflicts, P. 8-9).

The instruments at bar were not "sold for investment purposes" as respondent asserts (Br. 13). Indeed, they were not "sold" at all. They were issued for face value, under an agreement calling for *loans,* as in *Belden, Atlanta,* and *Ely & Walker.* And regardless of the natures of the instruments involved in *Dauphin Deposit Trust* and *Bellefield Co.,* the cases held respectively that instruments to be taxable must be marketable in security exchanges and that they must carry interest coupons or be in registered form. Likewise, the *Wilkinson* case declares flatly that the tax falls only on instruments known generally as corporate securities.

The instruments at bar do not remotely resemble either the highly formal freely transferable documents involved in *General Motors,* sold under competitive bidding, or the negotiable instruments found in *Commercial Credit,* convertible into formal debentures secured by a trust indenture. As tokens of long-term loans, they are more like the loan instruments involved in *Belden, Atlanta, Ely & Walker, Leslie,* and *Shamrock.*

CONCLUSION

Imposition of tax against these instruments ignores their extraordinary characteristics putting them in a class apart which should be deemed beyond the intendment of the statute. These essentially non-assignable, intra-mural, informal documents issued as part of the execution of a declared public use, are in essence receipts for advances by a parent to a subsidiary, of a novel kind especially prescribed by the laws of the State of New York. They lack the element of inherent commercial value requisite to an ordinary corporate obligation, whether a bond, debenture, certificate of indebtedness, or something else, and on this basis would seem to fall beyond the purview of the statute. In taxing them the court below raised clear conflicts with decisions of this Court and of the Circuits. The issuance of the writ will enable the Court, by proper construction of the statute, to quiet a constantly recurring multiplicity of controversies and suits.

Respectfully submitted,

EUGENE MEACHAM,
Counsel for Petitioner,
824 Connecticut Ave., N.W.
Washington 6, D. C.

Of Counsel:
DANIEL O. DECHERT
824 Connecticut Ave., N.W.
Washington 6, D. C.

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SUPREME COURT OF THE UNITED STATES

Nos. 217 and 274.—October Term, 1953.

Superior Films, Inc., Appellant, 217 *v.* Department of Education of the State of Ohio, Division of Film Censorship, Clyde Hissong, Supt.	On Appeal From the Supreme Court of the State of Ohio.
Commercial Pictures Corporation, Appellant, 274 *v.* The Regents of the University of the State of New York.	On Appeal From the Court of Appeals of the State of New York.

[January 18, 1954.]

Per Curiam.

The judgments are reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495.

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[January 18, 1954.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

The argument of Ohio and New York that the government may establish censorship over moving pictures is one I cannot accept. In 1925 Minnesota passed a law aimed at suppressing before publication any "malicious, scandalous and defamatory newspaper." The Court, speaking through Chief Justice Hughes, struck down that law as violating the Fourteenth Amendment, which has made the First Amendment applicable to the States. *Near* v. *Minnesota*, 283 U. S. 697. The "chief purpose" of the constitutional guaranty of liberty of the press, said the Court, was "to prevent previous restraints upon publication." *Id.*, p. 713.

The history of censorship is so well known it need not be summarized here. Certainly a system, still in force in some nations, which required a newspaper to submit to a board its news items, editorials, and cartoons before

it published them could not be sustained. Nor could book publishers be required to submit their novels, poems, and tracts to censors for clearance before publication. Any such scheme of censorship would be in irreconcilable conflict with the language and purpose of the First Amendment.

Nor is it conceivable to me that producers of plays for the legitimate theatre or for television could be required to submit their manuscripts to censors on pain of penalty for producing them without approval. Certainly the spoken word is as freely protected against prior restraints as that which is written. Such indeed is the force of our decision in *Thomas* v. *Collins*, 323 U. S. 516, 540. The freedom of the platform which it espouses carries with it freedom of the stage.

The same result in the case of motion pictures necessarily follows as a consequence of our holding in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502, that motion pictures are "within the free speech and free press guaranty of the First and Fourteenth Amendments."

Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. The movie, like the public speech, radio, or television, is transitory—here now and gone in an instant. The novel, the short story, the poem in printed form are permanently at hand to reenact the drama or to retell the story over and again. Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case. The First and the Fourteenth Amendments say that Congress and the States shall make "no law" which abridges freedom of speech or of the press. In order to sanction a

system of censorship I would have to say that "no law" does not mean what it says, that "no law" is qualified to mean "some" laws. I cannot take that step.

In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.